92-1251

Supreme Court, U.S.
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NO.:

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

ROBERT LEE ZIMMERMAN,

PETITIONER

v.

NORTHWESTERN MUTUAL
LIFE INSURANCE COMPANY
OF MILWAUKEE, ET AL.

RESPONDANTS

ON PETITION FOR A WRIT OF CERTIORARI
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In deciding this lawsuit brought under 42 Section 1983, did the lower courts exceed their authority, abuse their discretion or otherwise err in declaring that:

1. a privately owned downtown park is "analgous" to a shopping mall;
2. a privately owned downtown park is not a public forum;
3. a total ban on free speech in that park does not violate the First Amendment;
4. a warrantless seizure and arrest of Petitioner for campaigning in that park is not state action, nor violative of constitutional rights;
5. amending the complaint and further discovery are futile?

LIST OF PARTIES

The only other parties not listed in the caption are Mall Management Associates, Bishop Square Management Inc., Frank F. Fasi and Douglas G. Gibb in their respective capacities as Mayor and former Chief of Police of the City and County of Honolulu, and the City and County of Honolulu.

Michael Secter, who had been campaign manager for Petitioner at the time of the arrest, had been a Plaintiff in in the U.S. District Court but was dismissed as a Plaintiff by that court.

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PETITION FOR WRIT OF CERTIORARI

Petitioner hereby petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The judgment and memorandum opinion of the U.S. Court of Appeals for the Ninth Circuit appears at pp. 63-87 of the Appendix. Orders of U.S. District Court for Hawaii granting summary judgment to the public and private defendants appear at pp. 88-127.

JURISDICTION

The judgment and memorandum opinion of the court of appeals was

entered on August 21, 1992. Rehearing was denied on October 20, 1992; appears at pp. 61-62. This Court has jurisdiction under 28 U.S.C. Section 1254(1).

Original jurisdiction was conferred on the U.S. District Court of Hawaii by 28 U.S.C. Section 1331 and appellate jurisdiction was conferred on the U.S. Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. Section 1291.

CONSTITUTIONAL AND STATUATORY PROVISIONS

The First Amendment:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

The Fourth Amendment:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon

probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment:

"No person shall be deprived of life, liberty, or property without due process of the law and equal protection of the laws."

42 U.S.C. Section 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other

person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

STATEMENT OF THE CASE

1. Original Jurisdiction

Original jurisdiction was conferred on the U.S. District Court of Hawaii by 28 U.S.C. Section 1331 and appellate jurisdiction was conferred on the U.S. Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. Section 1291.

2. Background Regarding the Grassroots Campaign Strategy

In 1987, Petitioner initiated a grassroots political campaign for a U.S. Senate seat from Hawaii. The grassroots campaign's primary source of voter contact was the hand-to-hand distribution of

issues-oriented campaign leaflets, as unintrusively as possible, wherever voters gathered in traditional and appropriate public areas.

That grassroots campaign strategy, styled in part after the historical pamphleteering efforts of Thomas Paine and his peers, led directly to numerous interventions by and confrontations with public and private police, and several warrantless seizures, criminal arrests and criminal prosecutions.

3. Police Threats and Intimidations

On numerous occasions, Petitioner and his campaign

staffers went to parks, to shopping malls, to parking lots, to the state university and in these places were met by intimidating groups of public and private police whose various interferences and threats of arrest significantly chilled the campaign's ability to meet and greet prospective voters and discuss the issues.

With the passage of time the public and private police grew bolder and bolder, often harassing and threatening Petitioner and his campaign staffers with arrest.

As is generally the case, newspaper, television and radio advertising in Hawaii is very expensive. Thus, the grassroots

campaign relied almost exclusively on hand-to-hand leafletting. As leafletters, Petitioner and campaign staffers were friendly and unintrusive. Many months of campaigning in this way produced not a single complaint from the general public.

4. The Political Campaign Is Damaged By Police Interferences and then By the Arrest

The numerous police intimidations severely reduced Petitioner's ability to deliver the campaign's message to prospective voters and had a highly negative impact on the campaign's ability to

attract new campaign volunteers and keep the old ones.

Hawaii is a small place and those who speak out against mismanagement and corruption run the substantial risk of police intervention, ridicule and joblessness.

The first arrests occurred on and about the July 4th, weekend, 1988. Petitioner's campaign manager, a Native Hawaiian grandmother and Petitioner were arrested on separate days for distributing campaign literature to prospective voters outside the entrance to the Hawaii State Farm Fair. The fair itself is held on the grounds of a public high school

primarily for the benefit of the Hawaii Farm Bureau and private concessionaires. The grounds and facilities of the public high school are given over to these groups for zero rent and in return the state government's programs and the governor are showcased.

The Hawaii State Farm Fair free speech lawsuit was resolved in favor of free speech by freeing the state fair its discriminatory practices, but not until long after the campaign and lengthly criminal and civil trials.

For Petitioner's part in freeing the state fair from the dictatorial control of the state and the Hawaii Farm Bureau and

later for similar efforts to free Tamarind Park for free speech, Petitioner was depicted in the mass media as a criminal and televised with his arms handcuffed behind his back.

While being arrested for campaigning inside Tamarind Park (distributing copies of our Constitution and Bill of Rights to prospective voters), Petitioner spoke out to the public and private police alerting them that their action was violative of constitutional rights and that the mayor had his banner flying in the park and his people, city employees, were distributing leaflets in the park.

Petitioner was told by the public and private police that his constitutional rights were worthless and was arrested, again without a warrant, again with his arms handcuffed behind his back in full view of thousands of prospective voters.

REASONS FOR GRANTING THE PETITION

1. The Constitutional Issues of Free Speech and Warrantless Seizure and Arrest In Public Fora Are of Fundamental and Continuing Importance

Quoting Justice Stone in Hague v. CIO, 307 U.S. at 524:

"No more grave and important issue can be brought to this Court than that of freedom of speech and assembly, which the due process clause guarantees to all persons regardless of their citizenship..."

In deciding the merits of Petitioner's case the lower courts arbitrarily declared that a privately owned downtown park is, for purposes of applying constitutional law, analogous to a shopping center; App. at 69.

Such novel and inappropriate analogizing, whereby the lower courts arbitrarily substituted a non-existant shopping center for a fully operational downtown park, served to vaporize Petitioner's free speech and other rights and runs the significant risk, if allowed to stand, of diluting the fundamentals of the Bill of Rights to meaninglessness. Such action by the lower courts not only entirely

avoids the long-standing precedents of some of this Court's most quoted cases: It also creates constitutional law that defies the clear language of the First and Fourth Amendments.

What more can law-abiding citizens do as they pursue "life, liberty and the pursuit of happiness" than apply their common sense understanding of First Amendment free speech rights, as did Petitioner at Tamarind Park, to their day-to-day activities? Must we consult with constitutional experts before we distribute political leaflets? And even if we do seek the counsel of

constitutional experts, how are we to know which expert to rely on?

Even after the ruling of the lower courts in this case, it is highly unlikely that even the most sophisticated constitutional judges, lawyers and other scholars would know, or if they knew that they would agree, that for purposes of interpreting the First Amendment, that privately owned downtown parks are now to be treated as shopping centers and that our First and Fourth Amendment rights in such places are now inoperative.

2. The Lower Courts Greatly Exceeded Their Authority By Applying Improper Legal Standards To Avoid Long-Standing Precedents of the U.S. Supreme Court

In constructing their inappropriate analogy, which equates private, downtown parks to shopping centers, and thus avoiding this Court's ruling in Hague v. CIO, 307 U.S. 496 (1939) and its thousands of progeny, the lower courts never once referred to Hague or its progeny and instead relied solely on Hudgens v. NLRB, 424 U.S. 507 (1976) and Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).

By analogizing a downtown park to a shopping center, something neither this Court nor any other

court has ever done, the lower courts circumvented long-established legal precedent and furthered the conflicts in the circuits that arise out of Hudgens and Lloyd, supra. No precedent exists in American jurisprudence or its forebears that justifies a total ban on political speech, much less a total ban that is discriminatorily enforced in a privately owned downtown park.

Ever since the work of the Framers of our Constitution free speech in all parks is considered sacrosanct, an inalienable right, as fundamental, ordinal and consecrated as any right can be.

Tellingly, as recently as June of 1992 this Court reiterated its concern over protecting First Amendment rights in public and private parks by declaring such places are "quintessential public forums." In upholding First Amendment protections, the right to distribute leaflets at airports, this Court could have analogized an airport to a shopping mall, but, again tellingly, it did not. Instead, each Justice concurred that streets and parks are "quintessential public forums." Quoting from International Society for Krishna Consciousness Inc. v. Lee, United States Supreme Court No. 91-155 (June 1992):

"The suggestion that the government has a heavy burden in justifying speech restrictions relating to traditional public fora made its first appearance in Hague v. Committee for Industrial Organization, 307 U.S. 496, 515 (1939). Justice Roberts, concluding that individuals have a right to use ""streets and parks for the communication of views," reasoned that such a right flowed from the fact that:

"Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the

guise of regulation, be abridged or denied." Hague, 307 U.S. at 515, supra.

The emphasis in Justice Robert's and this Court's reasoned conclusions, as above, is clearly on streets and parks "Wherever the title of streets and parks may rest..." The utter clarity of Justice Robert's aforesaid phrase, has left no doubt about its meaning and application: First Amendment rights abound in streets and parks regardless of who or what owns them.

In further support of free speech in streets, parks and other public fora in International Society for Krishna Consciousness Inc., v. Lee, United States Supreme

Court No. 91-155 (June 1992), Justice O'Connor advises that,

> "[w]e have required some explanation as to why certain speech is inconsistent with the intended use of the forum."

In this case Respondants have not offered any substantive explanation for banning free speech at Tamarind Park. Conversely, this Court has held clearly and consistently that certain public places appropriate for assembly, communication and debate have been traditionally accorded special recognition as "public forums." Hague, supra. In such places the ability of the government or of persons acting under color of law

to restrict expressive conduct is severely limited.

By tradition and historical usage, parks are public forums. "'Public places' historically associated with the exercise of expressive activities, such as streets, sidewalks and parks, are considered, without more, to be 'public forums.'" U.S. v. Grace, supra, 461 U.S. 171, 177.

The keys to whether or not public open space is a public forum have always been (1) the appropriateness of that space to serve as a public forum and (2) how the property is actually used. Whether or not the property is publicly or privately owned/and or

controlled is a non-issue. Concern for security and discipline on military bases, for public safety as in congested streets and roadways, and for quietude in areas that abut hospitals are legitimate reasons for invoking exceptions to First Amendment freedoms. But parks are an entirely different matter. Parks are "by long tradition devoted to assembly and debate..." Perry Education Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. 37, 45.

Thus, even if Tamarind Park is private property, its attributes and usages place it squarely in the public domain where First Amendment

rights to free speech are inviolate.

In U.S. v. Grace, supra, 461 U.S. 171, this Court struck down as unconstitutional regulations banning political leafletting on the steps of this Court's own building. In so doing, it noted that:

"[t]here is no separation, no fence and no indication whatever to persons stepping from the street to the curb and sidewalks that serve as the perimeter of the court grounds that they have entered some special type of enclave." Id. at 180.

There is nothing separating Tamarind Park from the municipal streets and sidewalks, nothing indicating that Tamarind is "some special type of enclave."

Tamarind Park is unenclosed, unposted and open to the public. To the average person it appears to be a public park, and an undelineated extension of the municipal sidewalk.

"[t]he First Amendment free speech guarantee' has its fullest and most urgent application precisely to the conduct of campaigns for political office.'" Taxpayers for Vincent v. Members of City Council, 682 F.2d 847, 850 (9th Cir. 1982) aff'd 466 U.S. 789, quoting Monitor Pariot Co. v. Roy, 401 U.S. 265, 272.

[Leaflets are] "the least expensive means by which a candidate may achieve name recognition among voters in a local election." Quoting Baldwin v. Redwood City, 540 F.2d 1368 (9th Cir. 1976), cert. den., 431 U.S. 913 (1977).

As a park, Tamarind is a traditional free speech setting and its public character is enhanced by Respondants co-sponsorship of

"Mayor's Aloha Friday" festivities each and every Friday afternoon.

To hold, as the lower courts have held, App. at 77-78, that it is perfectly reasonable to seize and arrest, without a warrant, a political candidate, in the midst of conducting a grassroots political campaign, for the crime of trespassing because he is peacefully and unobtrusively distributing copies of our Constitution to prospective voters not only defies this Court's numerous precedents as in Hague and its progeny, it also creates the serious risk of destabilizing our bedrock notions regarding democracy and constitutional law generally.

Surely, if it is reasonable to find probable cause to seize and arrest a peaceable U.S. Senate candidate for doing nothing more than handing copies of our Constitution to prospective voters in a downtown park, it is reasonable to declare that constitutional rights apply only within the confines of our homes and then only to those who own their homes outright and not to mortgagees or renters. If the owner of a downtown park can use the power of government to enforce a total ban on free speech, then why not every landlord and mortgage holder?

If the inappropriate park equals a shopping center analogy of

the lower courts is left standing, the foundation will be set for even greater erosion of our constitutional rights. Argument or justification by analogy may lead anywhere. As an example, the trial judge in the District Court had likened Petitioner's leafletting outside the entrance to the Hawaii State Farm Fair to breaking onto his property and shooting his bulls. In fact, all of history's horrors and atrocities can be justified by clever analogizing, but such cleverness is usually only compelling to the heartless and the mindless.

3. Circuit Court Conflicts Abound Regarding the Convertibility of Private Property Into Public Fora For Purposes of Free Speech and State Action

But, even if, by dint of the alchemistic analogizing of the lower courts, Tamarind Park was legally transformed into a shopping center and was no longer a downtown park, on the date and time that Petitioner was arrested there, Tamarind Park was clearly a public forum.

On July 22, 1988, the date of Petitioner's seizure and arrest, as on most Friday afternoons, the public was specifically invited (by leaflet and other media to attend, free of charge and without a

ticket, "Mayor's Aloha Friday", a public event co-sponsored with federal and municipal funds by Respondants.

Just as the Hawaii State Farm Fair was the exclusive political preserve of the State of Hawaii and its governor, Tamarind Park has been, and still is, the exclusive political preserve of Honolulu's mayor and city government. Only the state's political themes were displayed at the fair and even the mayor had been officially denied access. Similarly, Tamarind Park is the private political preserve of Honolulu's mayor. Only the mayor's banner flies over Tamarind

Park and only the mayor's messages are communicated to the public.

Thus, only the predatory and discriminatory enforcement of Respondant's ban on free speech by the public and private police can explain the seizure and arrest of Petitioner at a public event in a public place to which the public had been specifically invited.

Surely the transformation of the Hawaii State Farm Fair and Tamarind Park by government and their private sector partners into private political preserves is unconstitutional and such cooperative co-sponsorship should in itself be dispositve of the public forum issue.

Historically, fairs are public fora, places where political candidates can make contact with voters. Edwards v. Maryland State Fair and Ag. Society, Inc., 628 F.2d 282 (1980); Hynes v. Metropolitan Government of Nashville and Davidson County, 667 F.2d 549 (1982). Given the abundance of clearly established law regarding public fora and the exercise of First Amendment rights at such fora, Petitioner's distribution of political materials at such a forum was clearly protected political speech.

Additionally, on the date of Petitioner's seizure and arrest at Tamarind Park, not only was

Tamarind a public forum but the ban on free speech was selectively and thus discriminatorily enforced. At the very time Petitioner was seized and arrested, a banner was hung inside Tamarind Park which stated "City and County of Honolulu-Frank F. Fasi, Mayor-Presents the Mayor's Aloha Friday Music Break." And as on most Friday mid-afternoons, Defendants' co-sponsor "Mayor's Aloha Friday" festivities. The city uses tax and other revenues to pay the performers. City employees find the performers, schedule their appearances and assist in generating grant proposals for additional funding (including federal funds) and advertising copy

to publicize the events and invite the public. Such advertising is placed in the local media. For its part of the co-sponsorship, the private Respondants provide the park, maintenance and security personnel.

Clearly, these facts evoke a strong inference that the free speech ban at Tamarind Park was discriminatorily enforced. Other leafletters, including those representing the interests of the mayor and of the City and County of Honolulu, had made use of Tamarind Park as a point of leaflet distribution for a considerable period of time prior to Petitioner's seizure and arrest.

City personnel were not threatened with seizure and arrest for their leafletting activities. Interestingly, the very fact that city leafletters did not have knowledge of Respondant's free speech ban is proof that the ban was either a sham or selectively enforced. The public and private police did not enforce the anti-free speech leafletting ban against City leafletters at Tamarind Park. In fact, the record evidence indicates that the only time the anti-free speech ban was enforced was during Petitioner's political campaign.

4. The Lower Courts Erred In Failing To Apply the Public Functions Doctrine To Tamarind Park

Under the public function doctrine, as expressed in Terry v. Adams, 345 U.S. 461, 469-70, (1953), it is clear that the more a property owner "opens up his property for use by the public in general, the more do his rights become circumscribed by the statuatory and constitutional rights of those who use it." Thus, "the owners of privately held bridges, ferries, turnpikes and railroads may not operate them as freely as a farmer does his farm. Since these facilities are built and operated primarily to benefit

the public and since their operation is essentially a public function, it is subjected to state regulations." Marsh v. Alabama, 326 U.S. at 506.

Tamarind, built, dedicated and operated as a public park, meets the Evans standard, 382 U.S. 296 (1966). Even if privately owned, it is municipal and public in nature and use. And as the private Respondants have voluntarily assumed the role of providing and operating a park, a role traditionally the exclusive perogative of the state, the private Respondants are state actors and Tamarind Park is, minimally, a limited public forum.

See e.g. Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640 (1981); and U.S. v. Grace, 461 U.S. 171, (1983).

Respondants have always referred to Tamarind as a park and have taken out full page advertisements to inform the public of Tamarind's public dedication, a dedication that has never been publically rescinded:

"One full acre of Bishop Square has been devoted to the creation of Tamarind Park, open for everyone to use and enjoy...Tamarind Park is respectfully dedicated to the...people of Honolulu...We want everyone to feel comfortable and safe. And we have lots of space for seating, where people can meet and talk..."

Tamarind also looks like a park, smells like a park and is

used as a park by the public 24 hours a day, 7 days a week, 365 days a year.

The dedication of Tamarind Park to the public, its continual use as a public park and as a place where public events are staged makes it a place where First Amendment rights of free speech are inviolate. See, Evans v. Newton, 382 U.S. 296 (1966). In Evans, a private trust established a park for the exclusive use of whites. This Court found that "the service rendered by a private park of this character is municipal in nature [and is] like a fire department that traditionally serves the

community." Id., 382 U.S. at 301-302.

It is clearly established "as a general matter peaceful picketing and leafletting are expressive activities involving 'speech' protected by the First Amendment." U.S. v. Grace, 461 U.S. at 176-177. "While government can place reasonable, time, place and manner restrictions on an individual's exercise of his right of free speech, absolute prohibitions require a compelling governmental purpose, narrowly drawn." 461 U.S., supra, at 175.

"Absent compelling circumstances, members of the public may not be excluded from public areas because of their purpose to use these areas for the

exercise of First Amendment rights."

In Niemotko v. Maryland, 340 U.S. 268,

277 (1951), as quoted in footnote n.4 of Planned Parenthood v. Clark

County School Dist., 941 F.2d 817

(9th Cir. 1991), this Court again

affirmed free speech rights in

parks declaring:

"[g]overnment's practice of granting or denying use of a park violates First Amendment because "[n]o standards appear anywhere; no narrowly drawn limitations; no circumscribing of this absolute power...."

The ban on political

leafletting at Tamarind Park is a

total and unqualified ban and as

such is facially unconstitutional

regardless of who or what prepared

it or when it was drafted.

5. The Lower Courts Erred In Failing To Apply Existant Hawaii Law To the Facts In this Case

Not only did the lower courts circumvent this Court's long-standing free speech precedents, as above, the lower courts gave zero credence to Hawaii law by dismissing the pendant state claims without a hearing and ignoring Hawaii constitutional law which gives to citizens First and Fourth Amendment rights even greater than those acknowledged under federal constitutional law.

The Hawaii State Supreme Court has ruled that the police may not effect warrantlesss arrests in

settings where First Amendment freedoms are implicated.

State v. Furuyama, 637 P.2d 1095 (1981).

The Hawaii State Supreme Court has also encouraged political leafletting in downtown business areas. Quoting federal precedent, the Hawaii State Supreme Court affirmed free speech rights at privately owned parks and retail business districts by declaring:

"[s]ome privately owned property may be treated as public for free speech purposes...Under some circumstances, privately owned property can be treated, for free speech purposes, as though it were publicly held. The right of access onto private property is premised on the fact that these places, such as sidewalks, streets, parks and retail business districts, are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot

constitutionally be denied broadly and absolutely." Estes v. Kapiolani Women's and Children's Medical Center, Haw. Sup. No. 13079, 787 P.2d 216 (1990); Hudgens v. NLRB, 424 U.S. 507 (1976).

6. Circuit Court Conflicts Abound Regarding Free Speech Rights In the Public Open Space Areas of Shopping Malls

Given the ever-decreasing ratio of of public to private space in the decades since Hudgens and Lloyd, supra, were decided, the ever-increasing velocity with which downtowns as we once knew them are being replaced with shopping malls, public streets, parks and sidewalks with private streets, parks and sidewalks, the ever-growing spending gap between party-sponsored and grassrooots campaigns

(with the Perot exception duly noted), as a matter of fundamental constitutional import which has produced wide discrepancies in the various circuits, this Court may wish to reconsider Hudgens and Lloyd.

First and Fourth Amendment rights were never intended to emanate exclusively from the possession of property and it is thus an unnecessary infringement on those rights to place restrictions on them in areas to which the public is specifically invited to congregate. Homes, retail stores, churches, military bases and other public and private property are, and ought to be, afforded

reasonable regulatory protection against unwanted speech. Such unwanted speech would be disruptive of the functions performed within these areas. But the general mall area of a shopping mall is more like public open space generally and serves to replace the traditional downtown and town square. Thus, absent compelling circumstances, there is no special, significant or substantive reason to justify banning free speech in the general mall areas of shopping malls. Such banning of free speech significantly elevates the property rights of a minority of mall owners over the First Amendment rights of approximately 260 million citizens

and empowers mall owners, who are a miniscule percentage of the total population, with a heavily disproportionate power to control what is said and the public's right to hear it.

7. The Lower Courts Abused Their Authority By Precluding Petitioner From Pursuing Discovery and Amending the Original Complaint

The lower courts abused their discretion by refusing Petitioner's numerous requests to take oral depositions and to amend the original complaint. Once, on appeal from the magistrate's ruling, the trial judge reversed the magistrate and ordered

Petitioner to pursue oral depositions and amend the original complaint. But that order was soon superceded by another order of the trial judge denying Petitioner the right to take oral depositions and to amend the original complaint. Petitioner had duly noticed numerous depositions and had repeatedly sought to amend the original complaint but each time Petitioner was precluded from so doing by the lower courts; App. at p. 82-84.

Thus, Petitioner was precluded by the lower courts from gathering important evidence including public documents showing the mutual benefits derived by the private and

public Respondants, the city's policy regarding arrests where constitutional rights are implicated, the mindsets of the police who participated in the arrest, the discriminatory enforcement of the ban on speech, the conspiracy between the Respondants to arrest Petitioner and discredit his political campaign and the like.

Clearly, the record evidence shows that pro se Petitioner was hamstrung by the district court when pursuing important discovery and amendment. While counsel for the private Respondant's who had clerked for the senior judge of the district court enjoyed every

benefit of his familiarity there, Petitioner was dealt with as a pariah and threatened by the magistrate with hundreds of thousands of dollars in sanctions for pursuing this lawsuit. Both the magistrate and the trial judge called Petitioner a criminal trespasser who had no constitutional rights.

The lower courts reasoning for precluding Petitioner from important discovery was simply that free speech at Tamarind Park is controlled by the same legal standards that apply to shopping malls and not those standards that apply to parks. Given that, the District Court declared that

[Petitioner] "has produced no such evidence, nor is there a possibility that further discovery would produce such evidence."

8. The Lower Courts Abused Their Discretion By Failing To Recuse the Trial Judge and the Magistrate

Petitioner had argued in the lower courts that for reasons of conflict of interest and bias that the trial judge and magistrate should have recused themselves. The magistrate in this case made six-figure profits from his dealings in a Honolulu City and County development project while hearing this case and failed to report those profits as required

under the judicial guidelines until those profits were reported in the local press. Petitioner sought his recusal with a motion to the magistrate and on appeal to the district court and to the court of appeals. Each time Petitioner failed.

If the writ of certiorari is granted, Petitioner respectfully reserves the right to brief the issue of the recusal of the magistrate and the trial judge.

9. Pendant State Claims

The pendant state claims in this lawsuit arise out of substantially the same set of facts as the federal claims but were

dismissed by the lower courts without a hearing and when these claims were brought in state court they were again dismissed without a hearing. If the writ of certiorari is granted, Petitioner respectfully reserves the right to brief the pendant state claim issue.

10. Considerable Changes Have Occurred In the Quantity and Quality of Public Open Space Since the Shopping Mall Cases Were Decided (1970's)

The free speech, conspiracy, seizure and arrest issues raised in this case have profound national and global implications. Given the intensifying budgetary pressures of urban governments, the vast urban

population migration to the suburbs, the increased implementation the concept of privatization of traditionally public functions and the replacement of many traditional downtown shopping areas with shopping malls, an ever-increasing quantity of public space is being converted to the private domain. Thus, less and less face-to-face space is available to grassroots, political candidates and others who wish to meet with the public to exchange political ideas. If the law of our land is held to mandate that a citizen may not pass to another citizen in a downtown park a copy of our very own Constitution

because the owner of the park, in this case an out-of-state mutual insurance company, has enacted a total ban on leafletting in that park, then we have replaced the rule of government with the rule of private parties, an act repugnant to the very essence of the Constitution's First Amendment which outlaws such action.

One of the earliest and crudest forms of governance is governance by private parties or clans. For most of man's history on earth a primitive competition had existed amongst innumerable clans who claimed dominion over one another and the land that they inhabited. Warrior clans clashed

with peaceable clans and for much of the time prior to the conceptualization and implementation of democracy, the peoples of planet earth were continuously terrorized and forced to live in a constant state of war, chaos and anarchy as clan warlords vied with one another for property and power. The collapsed government of Somalia is a contemporary example of such terror: As the competing Somalian clans vie with each other for property, power and dominance, hundreds of thousands of innocent people have starved and millions of others are at such risk.

In America at peace, absent compelling circumstances, no government, no private corporation, and no person has ever been vested with the power to alienate our fundamental rights and freedoms: Accordingly, all of the people of America, residents and visitors, rich and poor, proselitizers and politicians, ought not be subjected to the public humiliation of public seizure and arrest for exercising their right to speak freely in public places where the public is specifically invited to visit and congregate.

In this case, no compelling or otherwise substantive reason has been given for outlawing free

speech at Tamarind Park or any other park: Nor is Tamarind Park some special enclave, warded off from the general populace, established for purposes other than those which are traditionally parklike, like free speech.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests the petition for a writ of certiorari should be granted.

DATED January 16, 1993

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NO. 91-15705

D.C. No. CV-89-00484-ACK

ORDER

ROBERT L. ZIMMERMAN, Esq.,

Plaintiff -
Appellant

v.

NORTHWESTERN MUTUAL LIFE; MALL MANAGEMENT ASSOCIATES; BISHOP SQUARE MANAGEMENT INC.; FRANK F. FASI, in his capacity as Mayor of the City and County of Honolulu; COUNTY OF HONOLULU; DOUGLAS G. GIBB, in his capacity as the former Police Chief of the City and County of Honolulu, et al.

Defendants -
Appellees

Before BROWNING, PREGERSON and RYMER, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for a rehearing en banc is REJECTED.

FILED OCT 20 1992

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 91-15705
CT/AG#: CV-89-00484-ACK

ROBERT L. ZIMMERMAN, Esq.

Plaintiff -
Appellant

v.

NORTHWESTERN MUTUAL LIFE; MALL MANAGEMENT ASSOCIATES; BISHOP SQUARE MANAGEMENT INC.; FRANK F. FASI, in his capacity as Mayor of the City and County of Honolulu; COUNTY OF HONOLULU; DOUGLAS G. GIBB, in his capacity as the former Police Chief of the City and County of Honolulu, et al.

Defendants -
Appellees

APPEAL FROM the United States

District Court for the District of Hawaii (Honolulu)).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Hawaii (Honolulu)) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the _____judgment of the said District Court in this cause be, and hereby is AFFIRMED.

FILED and entered 08/21/92

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NO. 91-15705

D.C. No. CV-89-00484-ACK

MEMORANDUM*

ROBERT L. ZIMMERMAN, Esq.,

Plaintiff -
Appellant,

v.

NORTHWESTERN MUTUAL LIFE; MALL MANAGEMENT ASSOCIATES; BISHOP SQUARE MANAGEMENT INC.; FRANK F. FASI, in his capacity as Mayor of the City and County of Honolulu; COUNTY OF HONOLULU; DOUGLAS G. GIBB, in his capacity as the former Police Chief of the City and County of Honolulu, et al.,

Defendants -
Appellees.

Appeal from the United States District Court for the District of Hawaii

Alan C. Kay, District Judge, Presiding

Argued and Submitted June 9, 1992 San Francisco, California

BEFORE: BROWNING, PREGERSON and RYMER, Circuit Judges

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Robert Zimmerman brought an action against Northwestern Mutual Life and Bishop Square management, Inc. (the "private defendants"), and against Frank F. Fasi, the mayor of Honolulu, Douglas Gibb, the former Honolulu Police Chief, and the city and county of Honolulu (the "public defendants"), alleging

violations of 42 U.S.C. Sections 1983 and 1985 as well as various pendant state claims. The district court granted summary judgment in favor of both the public and private defendants on the federal claims and dismissed the pendant state claims. Zimmerman now appeals. We have jurisdiction pursuant to 28 U.S.C. Section 1291, and we affirm.

I

The district court granted summary judgment in favor of the public and private defendants on the Section 1983 claim on the ground that, inter alia, Tamarind Park is not a public forum. Based

on this determination, the district court concluded that the ban on handbilling does not implicate Zimmerman's First Amendment rights. Therefore, continued the court, Zimmerman could not demonstrate that he was deprived of a constitutional right, the necessary predicate to a Section 1983 action.

Zimmerman argues on appeal that the grant of summary judgment was improper because Tamarind Park is a public forum. We review de novo a grant of summary judgment. T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 629 (9th Cir. 1987). We agree that summary judgment was proper because Zimmerman failed to

demonstrate a genuine issue of material fact as to whether Tamarind park is a public forum.

The uncontroverted facts show that Tamarind park is a portion of the privately owned Bishop Square commercial complex. As the district court held, the record evidence establishes that Tamarind Park is analogous to a privately owned shopping center, and the owners of the park are therefore free to enact a "no handbilling" regulation. See Hudgens v. NLRB, 424 U.S. 507 (1976); Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).

Zimmerman argues that a 1983 newspaper advertisement for Bishop Square constitutes evidence that

Tamarind park was dedicated to public use and that therefore the park is a public forum. The advertisement states that the park is "open for everyone to use and enjoy." The advertisement does not, by itself, raise a genuine issue of material fact as to whether Tamarind Park was formally dedicated to public use, as it does not indicate that Tamarind park was in all crucial respects open to the public in the same ways a public park is. The advertisement alone does not distinguish Tamarind park from the shopping center in Lloyd, in which the Supreme Court held that property does not "lose its private character merely because

the public is generally invited to use it for designated purposes." Lloyd Corp., 407 U.S. at 569; see also United States v. Kokinda, 110 S.Ct 3115, 3121 (1990) (fact that postal entryways may be open to public does not by itself establish that such areas must be treated as traditional public fora under the First Amendment). The advertisement alone, therefore, is insufficient to create an issue of material fact as to whether Tamarind park is a public forum.

Zimmerman presented no other evidence demonstrating that Tamarind park was formally dedicated to public use. See Lloyd Corp., 407 U.S. at 570. He also

failed to present any other evidence that the private defendants, who own and manage Tamarind Park, invited the public to use the park unconditionally. See id. at 565. Furthermore, because there are public sidewalks surrounding the park, Zimmerman easily could have moved to the public space and continued his handbilling. See id. at 566-67. Finally, Zimmerman has failed to present any evidence, beyond his mere allegations, that the handbilling ban was discriminatorily enforced. See id. at 568. Summary judgment on this issue is accordingly appropriate.

Zimmerman also contends that Tamarind Park should be deemed a public forum because the city of Honolulu sometimes is permitted to present "Aloha Friday" concerts in the park. This argument lacks merit. The fact the private defendants allow entertainers to perform in Tamarind Park does not in and of itself render the park a public forum.[1]

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[1] Zimmerman also argues that the ban on handbilling violates the Hawaii Constitution. A Section 1983 action, however, must be predicated on a violation of the federal constitution (or a federal statute). See 42 U.S.C. Section 1983; see also, e.g., Guam Society of Obstetricians and Gynecologists v. Ada, No. 90-16704, slip op. 4191, 4200 (9th Cir. Apr. 16, 1992) (section 1983 creates liability for

deprivation of "rights, privileges, or immunities secured by the [United States] Constitution or federal law").

II

Zimmerman next argues that the total ban on handbilling is constitutionally defective. This argument is meritless. The Supreme Court in Lloyd Corp., 407 U.S. 551, specifically upheld a total ban on handbilling in a privately owned shopping center. See also Hudgens, 424 U.S. 507. Because Tamarind Park, like the shopping center in Lloyd, was privately owned, and because Zimmerman failed to raise a genuine issue of material fact as to whether it was dedicated to

public use or enforced its ban discriminatorily, a total ban does not infringe Zimmerman's First Amendment rights.

III

The district court also granted summary judgment for the public and private defendants on Zimmerman's Section 1983 claim based on an allegedly unconstitutional arrest and prosecution. Zimmerman makes three arguments on appeal: (1) that the citizen's arrest of Zimmerman constituted state action; (2) that the arrest violated his First Amendment rights; and (3) that the arrest and subsequent prosecution were unconstitutional

because the police lacked a warrant.

We need not determine whether the citizen's arrest constituted state action because, even if there were state action, there is no evidence of any constitutional violation. Because Zimmerman has no meritorious claim that his First Amendment rights were violated by the ban on handbilling, neither the private defendants' decision to enforce that ban nor Zimmerman's subsequent arrest for tresspassing implicates his First Amendment rights.

Zimmerman's allegation that a warrant was required prior to arresting him similarly lacks

merit. Zimmerman presented no evidence demonstrating that probable cause was lacking. Because the arresting parties had probable cause to believe that Zimmerman was trespassing, the warrantless arrest did not constitute an infringement upon any constitutionally protected right. See, e.g., State v. Vance, 602P.2d 933, 967 (Haw. 1979) ("[A] misdemeanor arrest by a police oficer without a warrant is lawful if the officer has probable cause to believe an offense is being committed in his presence."). Similarly, Zimmerman has not shown how his subsequent prosecution

violated any of his constitutional rights.

IV

The district court also entered summary judgment in favor of all the defendants on the Section 1985 conspiracy claim. The court noted that for Zimmerman to sustain a Section 1985 action, he must show racial or otherwise class-based, invidiously discriminatory animus. See Griffen v. Breckenridge, 403 U.S. 88, 102 (1971). The court then held that, because political candidates are not a member of a protected class under Section 1985, Zimmerman failed to show the class-based

animus necessary to support his claim.

Zimmerman now argues that the district court's finding was erroneous. The district court's holding however, correctly followed our precedent, see, Schultz v. Sundberg, 759 f.2D 714, 718 (9TH Cir. 1985), and is affirmed.[2]

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[2] Zimmerman also argues that there was "abundant state action" to support his Secion 1985 claim. We need not reach this issue, however, because Zimmerman has failed to present evidence of any class-based animus cognizable under Section 1985.

V

Zimmerman next contends that the district court abused its discretion when it refused to

permit Zimmerman to file an amended complaint. We conclude, however, that the district court did not abuse its discretion in denying the motion to amend. See Jackson v. Bank of Hawaii, 902 F.2d 1385, 1387 (9th Cir. 1990).

The district court may deny a motion to amend "if permitting an amendment would prejudice the opposing party, produce an undue delay in the litigation, or result in futility for lack of merit." Id. The district court specifically considered all three factors in evaluating whether to allow Zimmerman to file an amended complaint, and we cannot say that its determination that all three

factors indicated that a denial of the motion was appropriate constituted an abuse of discretion.

VI

Zimmerman further argues that the district court improperly denied him leave to conduct additional discovery. We review a district court's denial of a motion for further discovery for abuse of discretion. See Burns v. County of King, 883 F.2d 819, 824 (9th Cir. 1989).

We hold that the district court did not abuse its discretion in concluding that further discovery pertaining to the public defendants would be futile. As the

district court noted, no relevent evidence remained to be discovered. On appeal, Zimmerman lists numerous questions which he contends can only be answered after additional discovery. These questions, however, are irrelevent. Even if additional discovery on these issues was permitted, Zimmerman would still be unable to show a violation of his constitutional rights, the predicate to a Section 1983 action, or class-based animus of the type required to state a claim under Section 1985.

The district court also refused to allow additional discovery against the private defendants. Zimmerman's request

for additional discovery, however, was made more than a year after the complaint had been filed and after the court had already granted summary judgment in favor of the private defendants. Because Zimmerman had ample opportunity to conduct discovery prior to the filing of the summary judgment order, the district court did not abuse its discretion in denying Zimmerman's belated request.

VII

Zimmerman next challenges the magistrate's order granting the private defendants' Motion to Set Aside Entry of Default. We review the magistrate's order setting

aside the default judgment for abuse of discretion. See Pena v. Seguros La Comercial, S.A., 770 F.2d 811, 814 (9th Cir. 1985).

Zimmerman based his motion for default judgment upon his first amended complaint, which was filed without court approval. Although the magistrate did enter a default judgment against the defendants, he later set aside that default after finding that the first amended complaint "is, and was at the time of filing, a nullity because the filing of the First Amended Complaint was not authorized by the Court."

The magistrate acted within his discretion when he set aside a

default judgment which had been based on a complaint that was effectively a "nullity."

VIII

Zimmerman next argues that the pendant state claims should not have been dismissed. This claim lacks merit.

"When federal claims are dismissed before trial, the question whether state claims should still be entertained is within the sound discretion of the district court. Generally, dismissal of federal claims before trial dictates that the pendant state claims should also be dismissed." Schultz, 759 F.2d at

718 (citation omitted). Because Zimmerman's federal claims were properly disposed of on summary judgment, the district court did not abuse its discretion in dismissing the pendant state claims.

IX

Finally, Zimmerman notes on appeal that he unsuccessfully sought the recusal of both the district judge and the magistrate. Although Zimmerman mentions the recusal issue, he presents absolutely no argument as to why the judges erred in declining to recuse themselves. Because Zimmerman has presented no

argument, we deem the issue abandoned on appeal. See, e.g., Acosta-Huerta v. Estelle, 954 F.2d 581, 586 (9th Cir. 1992).

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

CIVIL NO. 89-00484-ACK

ROBERT LEE ZIMMERMAN,

Plaintiff,

vs.

NORTHWESTERN MUTUAL LIFE; BISHOP SQUARE MANAGEMENT INC.; FRANK F. FASI, in his capacity as Mayor of the City and County of Honolulu; COUNTY OF HONOLULU; DOUGLAS G. GIBB, in his capacity as the former Police Chief of the City and County of Honolulu, et al.

Defendants.

ORDER GRANTING CITY DEFENDANTS' MOTION FOR RECONSIDERATION, MODIFYING THIS COURT'S PREVIOUS ORDER, AND GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT AND DISMISSAL

PROCEDURAL BACKGROUND

This above captioned case involves a pro se plaintiff, Robert Zimmerman, who has asserted various federal and state claims against Northwestern Mutual Life and Bishop Square Management (collectively referred to as the "private defendants"), and public officials Frank Fasi, Mayor of Honolulu, and Douglas Gibb, former Chief of Police of the Honolulu Police Department. The public officials are collectively referred to as the "city defendants." Zimmerman's allegations stem from his arrest for trespassing and arrest on land owned by the private defendants.

The procedural history of this case is confusing, and several previous orders bear directly on the decision this Court must make in regard to the instant motion. On September 24, 1990, this Court denied Zimmerman's motion for partial summary judgment regarding his federal claims. At the same time, this Court granted the private defendants' motion for summary judgment with respect to the federal claims. At that time, the city defendants' had merely filed a joinder in the private defendants' motion, with no supporting affidavits. The Court denied summary judgment with respect to the city defendants and

directed them to file their own separate motion if they wished to pursue summary judgment regarding the claims against them. A written order regarding this ruling was entered on October 23, 1990.

Subsequently, the city defendants' filed a summary judgment motion with respect to the federal claims. The private defendant also filed a motion to dismiss the pendant state claims remaining against them, and the city defendants joined in that motion. Both of those motions were heard by this Court on January 7, 1991 and taken under advisement.

While those two potentially dispositive motions were under

advisement, this Court received various appeals from magistrate orders regarding attempted amendments to the complaint and discovery sought prior to the city filing its summary judgment motion. The two that are relevant to this discussion are an appeal from a December 11, 1990 magistrate decision that denied Zimmerman's motion to amend his complaint. Also on December 11, the magistrate denied in part Zimmerman's motion to compel oral depositions. A January 4, 1991 written order by the magistrate was entered regarding that ruling. Zimmerman appealed those issues to this Court.

On March 7, 1991, this Court partially granted Zimmerman's appeal from the magistrate's ruling's. That order allowed Zimmerman to amend his complaint to add several new city defendants, to add new state tort claims, and to clarify another one of the state tort claims. Zimmerman was also allowed to add new private defendants, but only if they were being sued under one of the state tort theories. The March 7, 1991, order also allowed Zimmerman 60 days to conduct depositions with respect to his federal claims against city defendants, but did not allow depositions regarding the state tort claims unless the person

being deposed was also being deposed with respect to the federal claims against the city defendants. The city defendants have now filed a motion for reconsideration of that March 7, 1991 order, arguing that the Court's ruling was erroneous.

After careful reconsideration and review of the myriad of often confusing complaints, amended complaints, motions, countermotions, and orders in this case, this Court agrees with the city defendants that the Court's March 7, 1991 order was erroneous. In its endeavor to afford every opportunity to a pro se plaintiff to develop his case through

discovery and amendments to his complaint--even if such efforts were dilatory--this Court failed to focus sufficiently on the futility of such discovery and amendments to adequately buttress the vulnerability of Zimmerman's federal claims and prevent their dismissal. For the reasons set forth below, the city defendants motion for reconsideration is granted, portions of this Court's March 7, 1991 order are reversed, the city defendants' motion for partial summary judgment regarding Zimmerman's federal claims against them is granted, and the private and city defendants' motion to

dismiss the pendant state claims is granted.

DISCUSSION

A. Standards for Reconsideration

A motion for reconsideration pursuant to Fed.R.Civ. P. 59(e) must establish one of the following three grounds: (1) an intervening change in controlling law, (2) availability of new evidence, or (3) the need to correct clear error or prevent manifest injustice. Great Hawaiian Financial Corp. v. Aiu, 116 F.R.D. 612, 616 (D.Haw. 1987) (citing Major v. Benton, 647 F.2d 110, 112 (10th Cir. 1981)). A motion for reconsideration must demonstrate two things. First, it

must demonstrate some reason why the court should reconsider its prior decision. Second, it must set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision. Great Hawaiian, 116 F.R.D. at 616. The city defendants have met those burdens as a result of their arguments that this Court's March 7, 1991 order was clearly erroneous and would result in manifest injustice.

B. The Federal Claims

1. The Section 1983 Claim

This Court's October 23, 1990 Order, which granted summary judgment in favor or the private

defendants with respect to the federal claims, found that there was no state action with regard to the citizen's arrest of Zimmerman at Tamarind Park. More importantly for purposes of this discussion, that order found that Tamarind Park was not a public forum, that the regulations prohibiting handbilling at Tamarind park were reasonable, and that there were reasonable alternatives for Zimmerman's speech activities on the adjacent public sidewalks. See, Order, Denying Plaintiff's Second Motion for Reconsideration of Order, March 8, 1991, at pp. 3-6. Accordingly, Zimmerman has no meritorious claim that his First Amendment speech

rights were violated, either by private or city defendants, during the events surrounding the Tamarind Park incident. Consequently, the arrest of Zimmerman was a valid arrest for trespass.

The only remaining grounds left for Zimmerman's Section 1983 claim against city defendants are possible due process or fourth amendment violations that may have occurred during his arrest and subsequent prosecution by the city. There is no evidence, however, that Zimmerman's fourth , fifth or fourteenth Amendment due process rights were violated when he was taken into custody by the police at Tamarind Park. A perusal of the

evidence shows that the police were merely responding to a valid trespass violation and handled the arrest in a normal fashion. Zimmerman merely complains that he was handcuffed at the scene of the trespass for twenty-five minutes while waiting to be transported to the police station.

1

Such conduct pursuant to a lawful arrest for trespass does not rise to a violation of Zimmerman's liberty interest. As this Court noted in a related case, it is standard procedure for Honolulu police officers to handcuff an arrested person. See Zimmerman v. Nakatani, Civ. No. 88-488 ACK,

Order Granting Defendants' Motions for Summary Judgment and Denying Plaintiff's Motion for Summary Judgment, July 3, 1990, at p. 45. It is ironic that upon his arrest in the Nakatani, case, Zimmerman complained of being put inside the police car while awaiting being transported to the police station. Now, in regard to his arrest at Tamarind park, Zimmerman complains that he was not put in the police car. In any event, Zimmerman's allegations about his treatment by the police, even if viewed in the light most favorable to Zimmerman, evidence no basis for a violation of his constitutional rights. Zimmerman's allegations contain no

evidence of brutality or exceptional conduct on the part of the police. Consequently, there is no need to allow Zimmerman to add the individual police officers as defendants in this case.

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[1] The Court notes that, in his original complaint Zimmerman claims he waited for 25 minutes while awaiting his transportation to the police station. Original Complaint at paragraph 23. Subsequently, in his declaration attached to his opposition to the city defendants' motion for partial summary judgment, Zimmerman states that he was left standing on the corner for a "minimum of 15 minutes." Zimmerman Declaration at paragraph 22.

In order to succeed in a Section 1983 action against supervisory defendants such as Gibbs and Fasi, Zimmerman must show

that the they failed to act or acted inadequately in the face of actual or imputed knowledge of a pattern of police misconduct. See Ybarra v. Reno Thunderbird Mobile Home Village, 723 F.2d 675, 680-81 (9th Cir. 1984)) (citing McClelland v. Facteau, 610 F.2d 693, 697 (10th Cir. 1979). Zimmerman must show that persons in a position of responsibility were "so indifferent as to tacitly encourage, condone, or acquiesce" in unconstitutional behavior. York v. City of San Pablo, 626 F.Supp. 34, 36 (N.D.Cal 1985) (citations omitted). The city defendants have attached a Police Commission Report which shows that police brutality is not

pervasive and that disciplinary action is taken when appropriate. See Exh. A attached to City Defs'. Motion for Partial Summ. Judgment.

Zimmerman cites five incidents which he claims constitutes a pattern or custom on the part of the city to violate his constitutional rights. Three of those incidents involve an incident at the Hawaii State Farm Fair. This Court has already found that those arrests were not unconstitutional. See Zimmerman v. Nakatani, Civ. No. 88-488 ACK, Order Granting In Part and Denying In part Plaintiffs' and Defendants' Motions For Summary Judgment (December 27, 1989). The fourth

incident is the incident at Tamarind Park, which this Court has found did not violate Zimmerman's First Amendment rights, but was merely a legitimate response to a trespass. See Orders of October 23, 1990 and March 8, 1991. The fifth incident involves a trespass warning received from the private defendants and the city on April 15, 1988, as a result of Zimmerman attempting to pass out handbills at Tamarind park. See Exh. 7 attached to Zimmerman's Opposition to this Motion for Reconsideration. It is clear from the discussion above that such a warning is not an infringement of his constitutional rights. Zimmerman has failed to

state a federal claim arising out of his trespass and subsequent arrest at Tamarind Park and no amount of additional discovery will change that.

Finally, Zimmerman contends that because city prosecutors did not drop the trespass charges against him until the day of trial, his constitutional rights were violated. However, as was discussed above and in previous order, Zimmerman broke the law. The prosecutors were entitled to prosecute him for such conduct. Zimmerman cannot complain of that conduct.

In order to make out a Section 1983 claim against the city

defendants, Zimmerman must show that "persons in a position of responsibility were so indifferent to prior incidents of misconduct as to tacitly encourage, condone, or acquiesce in the conduct." York v. City of San Pablo, 625 F.Supp. 34, 36 (N.D. Cal. 1985). Alternatively, Zimmerman must show some official policy or custom which violates Section 1983, or participation by a final policymaker in the wrongful action, in order for a government body to be sued under that statute. See City of St. Louis v. Praprotnik, 108 S.Ct. 915, 922-26 (1988); Monell v. Dept. of Soc. Serv. of City of New York, 436 U.S. 658,

690-91, 98 S.Ct. 2035-36 (1978). The assertions made by Zimmerman in his original complaint--as well as in his subsequent proposed amended complaints which were never accepted by the magistrate or this Court--at most make out a claim that there exists a policy on the behalf of final city policymakers to arrest him for trespassing on private property. There is no evidence of a city policy or decision of a final policymaker to arrest Zimmerman in violation of his constitutional rights.

2. The Section 1985 Claim

Zimmerman claims under 42 U.S.C. Section 1985 that defendants conspired to violate his free speech rights. For this claim to succeed, Zimmerman must show some racial or otherwise class-based animus in the action. Griffen v. Breckenridge, 403 U.S. 88 (1971). Politicians are not a class that requires special federal assistance in the protection of their civil rights. Schultz v. Sundberg, 759 F.2d 714, 718 (9th Cir. 1985). Zimmerman has failed to show any class-based animus which would allow his Section 1985 action to go forward. Moreover, as discussed above, Zimmerman's First Amendment rights were not violated.

3. Zimmerman's Appeal From Magistrate Orders

As this Court stated in its March 7, 1991 order which partially granted and partially denied Zimmerman's appeal from the magistrate, the policy favoring amendments to complaints should be interpreted with "extreme liberality." United States v. Webb, 655 F.2d 977, 980 (9th Cir. 1981). In civil rights cases where the plaintiff appears pro se, the court must construe the pleadings liberally and must afford the plaintiff the benefit of any doubt. Karim-Panahi v. Los Angeles Police Dept., 839 F.2d 621, 623 (9th Cir. 1988). In this case, construing

Zimmerman's complaint and proposed amended complaint so as to afford him the benefit of any doubt, Zimmerman cannot prevail on his federal claims against the city defendants. His motion to amend his complaint was properly denied by the magistrate. This Court now amends its own order of March 7, 1991, insofar as it granted Zimmerman leave to file an amended complaint. Such amendment would be futile and shall not be allowed.

In its March 7, 1991 order, this Court also granted Zimmerman leave to conduct additional depositions . The Ninth Circuit generally disfavors summary judgment where relevant evidence

remains to be discovered. Klingele v. Eikenberry, 849 F.2d 409, 412 (9th Cir. 1988) (citing Taylor v. Sentry Life Ins., 729 F.2d 652, 656 (9th Cir. 1984). However, as discussed above, no relevant evidence remains to be discovered. Even if Zimmerman uncovered some "conspiracy" or "policy" in regard to his speech activities at tamarind park, at most it would be a conspiracy or policy to arrest him for violating the trespassing laws of the City and County of Honolulu. As for any due process violations with respect to how he was treated by the police, Zimmerman has personal knowledge of the facts relating to such a claim.

The allegations he raised in his complaint and in connection with subsequent summary judgment motions do not make up a Section 1983 or Section 1985 claim for violation of his due process rights. Zimmerman has had ample time to state such a claim. Consequently, further discovery would be futile in this case, and this Court now amends its March 7, order to the extent that it granted Zimmerman leave to conduct additional discovery. Zimmerman shall not have such leave to conduct additional discovery.

C. City Defendants' Summary Judgment Motion

The City Defendants', as moving party, have met their burden of identifying for the court the absense of any genuine issue of material fact in regard to the federal claims. Zimmerman, as a non-moving party, may not rely on the mere allegations in the pleadings to preclude summary judgment. T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987). At least some "significant probative evidence tending to support the complaint" must be produced by Zimmerman. Id. Zimmerman has produced no such evidence, nor is there a possibility that further discovery

would produce such evidence. City defendants' summary judgment motion regarding the federal claims against them, therefore, is granted.

D. The Pendant State Tort Claims

Zimmerman has attached a number of state tort claims against the defendants. Because this Court hss granted the city defendants' motion for summary judgment on the federal claims, only the state tort claims remain. This Court has discretion whether to retain jurisdiction over the pendant state claims. Rosado v. Wyman, 397 U.S. 408, 404 , 90 S.Ct. 1207, 1213-14 (1970). Such pendant state claims,

as a general rule, should be dismissed if the federal claims are resolved before trial. United Mine Workers v. Gibbs, 383 U.S. 715, 726, 86 S.Ct. 1130 (1966). Courts have consistently followed this rule in cases involving federal civil rights statutes. See, e.g. Girard v. 94th Street & Fifth Ave., 530 F.2d 66, 72 (2nd Cir. 1976), cert. denied 425 U.S. 974 (1976). The rationales for the rule include avoidance of making needless decisions of state law, comity, and judicial economy, convenience, or fairness. Gibbs, 383 U.S. at 726.

Federal courts should dismiss pendant state claims absent special circumstances. Examples of such

circumstances include situations in which the defendant fails to call the court's attention to the weakness of plaintiff's federal claim until the court has invested a substantial amount of time on the case; the presence of significant questions of federal policy; and situations in which dismissal of the claims would sharply clash with the directive announced in Gibbs that the doctrine serve the ends of judicial economy, convenience, and fairness to litigants. Kavit v. A.L. Stamus & Co., 491 F.2d 1176, 1179-80 (2nd Cir. 1974). Even when acknowledging that pro se pleadings are held to a less stringent standard, courts have dismissed a

pro se's pendant state claims after a Section 1983 claim was dismissed. See, e.g., Jones v. Community Redev. Agency, 733 F.2d 646, 651 (9th Cir. 1984).

In an earlier case involving an arrest of Zimmerman, this court decided to exercise its discretion to retain pendant state claims. See, Zimmerman v. Nakatani, Civil No. 88-488 ACK (Order dated Dec. 27, 1989 at p. 47.) The Court found that it had expended substantial time and effort in the case. Id. More importantly, the Court had already considered some of the pendant state claims. Id. at 35-38.

In the instant case, no special circumstances exist that militate against applying the general Gibbs rule. The defendants promptly alerted the Court to the weakness of Zimmerman's federal claims. The time the Court expended on the case has been entirely focused on the federal claims. No question of federal policy remains. Fairness, comity, and economy would best be served by dismissing the pendant claims.

CONCLUSION

The Court hereby amends the portions of its March 7, 1991 order that granted Zimmerman leave to file an amended complaint and

granted Zimmerman additional time to conduct depositions. The Court also amends the portions of the March 7 order which continued consideration of the city defendants' motion for partial summary judgment and the private and city defendants' motion to dismiss the pendant state claims. The proposed amendments and depositions would be futile. Zimmerman's First Amendment rights were not violated by his arrest. Neither does Zimmerman's treatment by police or prosecutors after his arrest violate his due process rights. Any city conspiracy or policy related to this incident could only be a conspiracy or

policy to legally arrest and prosecute Zimmerman for trespassing. Consequently, the city defendants' motion for summary judgment with respect to the federal claims in this case is granted. Further, the private and city defendants' motion to dismiss the pendant state claims is also granted.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, April 17, 1991.

Alan C. Kay
United States
District Judge

ZIMMERMAN V. NORTHWESTERN, ET AL., CIV. NO. 89-484 ACK; ORDER GRANTING CITY DEFENDANTS' MOTION FOR RECONSIDERATION, MODIFYING THIS COURT'S PREVIOUS ORDER, AND GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT AND DISMISSAL

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII
CIVIL NO. 89-00484-ACK

ROBERT LEE ZIMMERMAN,
Plaintiff,

vs.

NORTHWESTERN MUTUAL LIFE; BISHOP SQUARE MANAGEMENT INC.; FRANK F. FASI, in his capacity as Mayor of the City and County of Honolulu; COUNTY OF HONOLULU; DOUGLAS G. GIBB, in his capacity as the former Police Chief of the City and County of Honolulu, et al.

Defendants.

ORDER GRANTING DEFENDANTS THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY'S AND MALL MANAGEMENT ASSOCIATES DBA AS BISHOP SQUARE MANAGEMENT INC.'S MOTION FOR PARTIAL SUMMARY JUDGMENT FILED JULY 27, 1990, DENYING PLAINTIFF ROBERT LEE ZIMMERMAN'S COUNTER MOTION FOR PARTIAL SUMMARY JUDGMENT FILED ON SEPTEMBER 5, 1990, AND DENYING THE CITY DEFENDANTS' JOINDER IN DEFENDANTS THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY'S AND MALL MANAGEMENT ASSOCIATES DBA AS BISHOP SQUARE

MANAGEMENT INC.'S MOTION FOR PARTIAL SUMMARY JUDGMENT FILED ON SEPTEMBER 6, 1990

Defendants The Northwestern Mutual Life Insurance Company's and Mall Management Associates dba Bishop Square Management, Inc.'s Motion for Partial Summary Judgment filed on July 27, 1990; Plaintiff Robert Lee Zimmerman's Counter Motion for Partial Summary Judgment filed on September 5, 1990, and the City Defendants' Joinder in Defendants The Northwestern Mutual Life Insurance Company's and Mall Management Associates dba Bishop Square Management, Inc.'s Motion for Partial Summary Judgment filed on September 6, 1990, having come for hearing before the Honorable

Alan C. Kay on September 24, 1990 with Plaintiff Robert Lee Zimmerman appearing pro se; William A. Bordner on behalf of The Northwestern Mutual Life Insurance Company's and Mall Management Associates dba Bishop Square Management, Inc.; Arthur Muroka on behalf of Frank F. Fasi, in his capacity as Mayor of the City and County of Honolulu, the City and County of Honolulu, and Douglas Gibb in his capacity as Chief of Police of the Police Department; and no one appearing on behalf of Plaintiff Michael J. Secter, as Campaign Manager for Citizens for Bob Zimmerman, and the Court having considered the arguments presented,

the memoranda submitted, and the record and files herein,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Plaintiff ROBERT LEE ZIMMERMAN's Counter Motion for Partial Summary Judgment filed on September 5, 1990 is denied;

2. City Defendants' Joinder in The Northwestern Mutual Life Insurance Company's and Mall Management Associates dba Bishop Square Management, Inc.'s Motion for Partial Summary Judgment is denied without prejudice to refiling with appropriate affidavits; and

3. Defendants' The Northwestern Mutual Life Insurance

Company's and Mall Management Associates dba Bishop Square Management, Inc.'s Motion for Partial Summary Judgment filed on July 27, 1990 is granted. The court finds that the Plaintiffs' claims under 42 U.S.C. Section 1983 and Section 1985 are, as a matter of law, without merit. There is no genuine issue as to material fact and the court finds that the alleged activity complained of does not constitute action under color of state law or state action; that the premises on which the complained of activity took place was not a public forum; that the regulation prohibiting handbilling on the Bishop Square Complex

premises was reasonable and that the regulations applicable to the Bishop Square Complex and the nature and location of the premises, including the proximity of the adjacent municipal sidewalks, provided reasonable alternatives for plaintiffs' speech activities.

DATED: Honolulu, Hawaii,
Oct 23, 1990

ALAN C. KAY
JUDGE OF THE ABOVE-
ENTITLED COURT